

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



75-2006

APP/SGRU.

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United States Court of Appeals  
For the Second Circuit  
No. 75-2006

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United States of America ex rel.  
JULIUS FULLER,

Relator-Appellant,

-against-

ROBERT HENDERSON, SUPERINTENDENT,

Respondent.

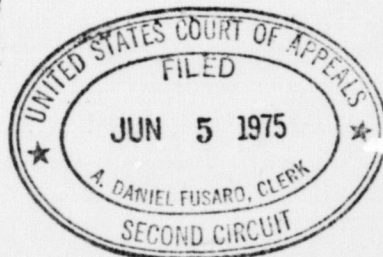
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On Appeal from the United States District Court  
for the Southern District of New York

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Appellant's Brief in Support  
of Petition for a Rehearing  
and Appendix

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On Appeal from the United States District Court  
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Appellant's Brief in Support  
of Petition for a Rehearing

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THE ISSUES PRESENTED FOR REVIEW

1. Whether the denial of a writ of habeas corpus should have been affirmed for a failure to exhaust state remedies when the Appellant did not have an available state remedy?

2. Whether an Order on an appeal taken in forma pauperis, affirming the denial of a writ of habeas corpus should omit to state that the affirmance was without prejudice and should tax the Appellant with the costs of the appeal?

### STATEMENT OF THE CASE

This is a Petition pursuant to Rule 40 of the Federal Rules of Appellate Procedure for a rehearing of an appeal taken in forma pauperis in which the Court affirmed the Order of the District Court denying Appellant's Petition for a Writ of Habeas Corpus. Appellant Julius Fuller (hereafter referred to as Fuller) contended that his New York State conviction in 1956 of manslaughter was procured by the use at the trial of an involuntary confession (A12).<sup>\*</sup> The rehearing is sought because this Court, in affirming the denial of the writ, relegated Fuller to a non-existent remedy in the state court.

The Court affirmed the denial of the Petition following argument on May 22, 1975 and the written Order was filed the same day (RA 1).<sup>\*\*</sup> At the argument the Court stated as its reasons for the affirmance that Fuller had not raised the involuntariness of his confession in state court and that under the rule of Picard v. Connor, 404 U.S. 270 and 28 U.S.C. §2254 Fuller had failed to exhaust his state remedies. The Court "strongly urged" Appellant to institute state proceedings and stated that if Fuller is denied a state remedy, he should then reapply for federal habeas corpus relief. The written Order of the Court (RA 1), however, did not indicate that the denial of the Petition was on the ground that Fuller did not exhaust state

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<sup>\*</sup> References preceded by the letter "A" are to the Appendix to Appellant's main brief on appeal.

<sup>\*\*</sup> References preceded by the letters "RA" are to the Appendix to this brief.



remedies and provided that Fuller, a poor person, be taxed with the costs of the appeal.

Appellant contends that the reasons given for the affirmance indicate that the Court misapprehended the law of New York; for Fuller does not have an available remedy to challenge the voluntariness of his confession. Respondent conceded there is no available state remedy (R 21).<sup>\*</sup> It is therefore futile to require Fuller to make an application to state court and Fuller's appeal should be decided on the merits. In the alternative, the written Order of the Court should be amended (a) to state that the affirmance was not on the merits and (b) to delete the requirement that Fuller be taxed with the costs of the Appeal.

#### THE STATUTES INVOLVED

See Appendix to this Brief for a statement of the statutes involved (RA 2, 3).

#### THE RELEVANT FACTS

The coercion of Fuller's confession appears on the face of the record (B 7 - 13 ).<sup>\*\*</sup> At the trial there was no objection to the use of his confession and its fruits on that ground (though other grounds were urged) and the trial court did not submit to the jury the issue of voluntariness. On the

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\* References preceded by the letter "R" are to Respondent's main brief.

\*\* References preceded by the letter "B" are to Appellant's main brief.

unsuccessful direct appeals from his conviction and in a State habeas corpus proceeding in 1962, Fuller also did not challenge the introduction of the confession on the ground of involuntariness.

Fuller's trial counsel did not raise the involuntariness of the confession at trial or on appeal because of his (erroneous) belief that such a challenge would not succeed (B 9 ). The trial strategy adopted was to make the best of the confession's inevitable introduction by emphasizing exculpatory portions of it (T330-400)\*; by denying it was a confession to the precise crime charged (T507-509 ); and by contending that under current State practice it was not, technically, a confession at all (T 483, 544, 549-555). The contentions, pursued on appeal, were unsuccessful. People v. Fuller, 9 A.D.2d 877, aff'd 8 N.Y.2d 866.

As the confession and its fruits were the only evidence connecting Fuller with the crime charged, exclusion of that evidence would have resulted in a failure of proof by the prosecution. Thus it cannot reasonably be deemed to have been the strategy of Fuller's trial counsel to allow the introduction of the confession in evidence and waive a challenge to its constitutionality; and Fuller cannot reasonably be held to have acquiesced in a waiver of his constitutional rights, when his counsel (wrongly) believed that a constitutional challenge was not available.

Fuller's sentence for manslaughter does not expire until November 1976. Fuller is concurrently serving a sentence

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\* References preceded by the letter "T" are to the trial transcript.



for a second felony conviction. The second sentence does not expire until April 10, 1979 (R 2 ). The second conviction is not challenged in the present proceeding and it has not been challenged in any collateral proceeding in state or federal court. Thus, if Fuller were to be discharged from his first conviction, he would still be lawfully imprisoned for his second conviction.

#### ARGUMENT

FULLER DOES NOT HAVE ANY WAY OF CHALLENGING HIS CONVICTION IN NEW YORK STATE COURTS. THIS COURT ERRED IN REQUIRING FULLER TO EXHAUST HIS REMEDIES IN THE STATE COURTS BEFORE PROCEEDING IN THE FEDERAL COURT.

- A. The requirement of exhaustion of state remedies applies only to remedies available to a petitioner at the time of his application for federal habeas corpus relief.

In Fay v. Noia, 372 U.S. 391, the petitioner, convicted of murder, had not appealed to the state appellate court on the ground his confession was coerced, the ground he urged in the petition under review. The Supreme Court held that Noia's failure to appeal was not a "failure to exhaust state remedies" under 28 U.S.C. §2254. The federal requirement that a petitioner exhaust state court remedies (the "exhaustion" rule), the Court held (372 U.S. at 434-435), applies only to remedies that are available to the petitioner at the time of application for the federal writ. In Picard v. Connor, 404 U.S. 270, the Court held that the exhaustion rule required a petitioner to exhaust collateral state remedies (including habeas corpus) as well as

appellate remedies but it did not alter the requirement that such petitioners exhaust only the remedies available at the time of the petition.

B. Coram nobis relief is not available to Fuller in New York.

Fuller does not have a right to coram nobis relief because of the failure on the trial or appeal to raise the issue of the voluntariness of his confession.

The post-conviction motion for "writ of error coram nobis" was codified in 1971 in New York Criminal Procedure Law §440.10. Subdivision 1(h) of the statute permits review of a conviction that the defendant claims was obtained in violation of his constitutional rights.

"[S]ubdivision 2 proceeds to narrow its [subdivision 1's] application in another sense in order to prevent it from being employed as a substitute for appeal. Thus, while [a constitutional claim] ... may constitute a ground for the motion, this remedy is not available to the defendant when he ... could readily have raised it on appeal but simply failed to do so (par. c)". (Practice Commentary, 11A McKinney's Consolidated Laws of New York, Criminal Procedure Law, at p.184.)

The limitation in §440.10(2)(c) is a codification of prior authoritative decisional law. In People v. Pereira, 26 N.Y. 2d 265, the Court of Appeals affirmed the denial of a writ of error coram nobis. A defendant who had been convicted of murder argued that his confession was unlawfully procured and introduced at trial because it was obtained after he was confronted with illegally seized evidence. The Court held the denial of coram nobis relief was appropriate because the defendant "failed



to move to suppress the confession or in any way object to its admission at the trial" (26 N.Y.2d at 268). Accord: People v. Howard, 12 N.Y.2d 65, at 66, 68 (Fuld, J.); People v. Huntley, 15 N.Y.2d 72, at 77; United States ex rel. Conomos v. LaVallee, 363 F. Supp. 994 at 1005-1006 (S.D.N.Y., Weinfeld, J.).

Under the rule of Pereira, and the other cases cited above, and under CPL §440.10(2)(c), all of which control Fuller's claim, it is clear that coram nobis relief is not now available to Fuller, for the question of voluntariness was not raised by Fuller at the trial or on the direct appeal.

Fuller's failure to raise the issue in state court does not amount to a deliberate bypass of his constitutional rights. (B 22-25 ).\*

C. Habeas corpus relief is not available to Fuller in New York State courts

Fuller may not petition for state habeas corpus relief for (i) Fuller is concurrently imprisoned under another

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\* Unlike the cases cited by the Respondent in support of a finding of waiver (R 21) in Fuller's case there was no evidence connecting him with the crime other than the challenged confession. In United States ex rel. Terry v. Henderson, 462 F.2d 1125 (2d Cir.) and United States ex rel. Cruz v. LaVallee, 448 F.2d 671 (2d Cir.), cert. denied 406 U.S. 958, cited by Respondent, trial counsel's strategy was affirmatively to use the confessions for the exculpatory material in them in order to help overcome the "overwhelming" eyewitness and other evidence proving the defendants' guilt. Both cases arose out of the same incident. There has not been any weakening of the rigorous test that the government must meet before a claim of "waiver" can be sustained. Compare Johnson v. Zerbst, 304 U.S. 458 and Sanders v. United States, 373 U.S. 1, at 19-20 with Schneckloth v. Bustamonte, 412 U.S. 218, at 235-241.

felony conviction; and (ii) the voluntariness of Fuller's confession was not tested at the trial or on direct appeal.

- (i) The remedy of habeas corpus is not available because of Fuller's legal detention under a separate felony conviction

CPLR 7003 has been interpreted to mean that a prisoner who is being legally detained may not bring a writ to test a separate illegal detention. See 7A Weinstein-Korn-Miller, "New York Civil Practice" ¶7003.08. In a case such as Fuller's where the alleged illegal detention will expire before the valid one, the writ will never become available. As shall be shown the contrary rule prevails in federal habeas corpus proceedings.

The Court of Appeals, in People ex rel. Young v. Martin, 297 N.Y. 892, unanimously held that one who was contemporaneously held under other valid sentences may not in a petition for a writ of habeas corpus question the validity of a conviction.

The principle of Young v. Martin has been consistently applied in New York.\* See e.g. People ex rel. Dote v. Martin, 294 N.Y. 330; People ex rel. Smith v. McMann, 29 A.D.2d 594; and People ex rel. Metz v. Fay, 11 A.D.2d 1067.

In Potenza v. Oneida County Bar Association, 29 A.D.2d 213 (4th Dep't), an attorney was suspended for collecting

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\* Except for People ex rel. LaBelle v. Harriman, 35 A.D.2d 13 (3rd Dep't) in which an exception was made for a petition brought while petitioner was concurrently being detained on a charge of murder in which it was alleged the State failed for more than five years to arraign the Defendant on a charge of assault.



an unconscionably excessive fee for bringing a writ of habeas corpus that the Court found he should have known was fruitless. The Court held (29 A.D.2d at 216 ):

" ... it is apparent that a minimum of legal research would have disclosed to respondent that in 1964 the first concededly valid sentence was in full force and effect and that the application for relief by habeas corpus was premature."

In the federal jurisdiction, the writ is broader in scope than in the New York State courts. Federal habeas corpus is available to Fuller to challenge the manslaughter conviction despite the fact that he is concurrently serving a valid sentence for another crime. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 488-489; Peyton v. Rowe, 391 U.S. 54; and Warren v. Hogan, 373 F. Supp. 1241, at 1242-1243 (S.D.N.Y. Gurfein, J.).

In People ex rel. Henderson v. Casscles, 66 M.2d 492, a petition for a state writ of habeas corpus was denied, for the petitioner was concurrently serving two valid sentences. The Court recognized that the federal rule was contrary but held (66 M.2d at 494 ):

"The fact that in the federal jurisdiction the writ is broader in scope does not impose upon the states obligations of a reciprocal nature....."

- (ii) It is doubtful that Fuller may have state habeas corpus relief for the further reason that he did not raise the involuntariness of his confession at the trial or on appeal.

Under New York State law, habeas corpus is not an

available remedy for a challenge to the voluntariness of a confession used in a trial held before Jackson v. Denno, 378 U.S. 368, was decided. In People v. Huntley, 15 N.Y.2d 72, the Court of Appeals rules (15 N.Y.2d at 76-77):

" ... habeas corpus seems ... unfitted as a means for obtaining the relief required by Jackson v. Denno ... We conclude that unless the habeas corpus sections (Art. 70) of CPLR are changed in several respects [so as to remove the requirement that the application be made in the county of imprisonment] the writ is not usable as a process for Jackson v. Denno relief."\*

The unavailability of habeas corpus relief in New York in circumstances such as Fuller's was recognized in United States ex rel. Leeson v. Damon, 496 F.2d 718 (2d Cir.), a successful appeal from a denial of a federal writ of habeas corpus. Defendant urged in his petition that his guilty plea was not a knowing waiver of his constitutional rights. The Court believed that the issue had been tried in the New York courts and that the petitioner had exhausted his state remedies and therefore reached the merits, but ruled that in any event (496 F.2d at 721):

"[N]o state collateral remedy would be available in the event he were held not to have raised the question on appeal." (496 F.2d at 721).

Cf. People ex rel Keitt v. McMann, 18 N.Y. 2d 257, in which the New York Court of Appeals reaffirmed that habeas corpus could not be used in place of an appeal, but stated that it could be used to test the constitutionality of the introduction of a

\* There has not been such an amendment of Article 70.



defendant's prior conviction (though not raised at trial or on appeal) where "dictated ... by reason of practicality and necessity" 18 N.Y.2d at 262. It is clear that "practicality and necessity" would not be found in a situation, such as the instant case, where there is a challenge to the voluntariness of a confession introduced at a trial held before Jackson v. Denno, 378 U.S. 368, was decided and where the issue could easily have been but was not raised at trial or on appeal. See People v. Huntley, 15 N.Y.2d 72, at 77, and People ex rel. Henderson v. Casscles, 66 M.2d 492, at 494 .

In United States ex rel. Cubicutti v. Vincent, 383 F. Supp. 662 (S.D.N.Y., Gurfein, J.), the Court did not require the petitioner to pursue the "uncertain" remedy of habeas corpus in New York state courts. In Vincent the court vacated a prior decision dismissing the writ for petitioner's failure to challenge the sufficiency of the search warrant in state post-conviction proceedings. The Court found that, as petitioner could have but did not raise the issue at trial or on appeal, coram nobis was not available and the availability of state habeas corpus for such a challenge was at best uncertain. Thus, the Court held, it would be inappropriate not to consider the federal writ on the merits and unfair to require the petitioner to make further, futile, tests of the availability of a state remedy.

In Fuller's case, the futility of a further test of state remedies is more apparent than in Vincent for Fuller is concurrently serving a valid sentence for another crime.





Fuller's appeal should be decided on the merits.

CONCLUSION

For the reasons set forth, Fuller's petition for a rehearing should be granted. Upon rehearing the Court is requested to countermand its determination that Fuller has not exhausted his available state remedies and, upon the merits of the appeal, discharge Fuller from his conviction of manslaughter on the ground it was procured by the unlawful use of his involuntary confession. In the alternative the Court should remand the proceeding for a hearing in the District Court with respect to the voluntariness of Fuller's confession and whether he waived his right not to be convicted in violation of his Fifth and Fourteenth Amendment rights. In any event, the Court should amend the Order dated May 22, 1975 to state the reasons for the affirmance of the denial of the petition and to delete any requirement that Fuller pay costs.

Dated: New York, N.Y.  
June 5, 1975

Respectfully submitted,

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